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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO ANTONIO BALLARD,

Defendant and Appellant.

D049103

(Super. Ct. No. SCE247764)

APPEAL from a judgment of the Superior Court of San Diego County, Christine K. Goldsmith, Judge. Affirmed.

A jury convicted Roberto Antonio Ballard of (1) assault on a child, Angel De Leon, under eight years old resulting in his death in violation of Penal Code¹ section 273ab; and (2) involuntary manslaughter in violation of section 192, subdivision (b). Ballard admitted he had served a prior prison term under section 667.5, subdivision (b). The court sentenced Ballard to a term of 25 years to life on the conviction for the assault

¹ All further statutory references are to the Penal Code.

resulting in death, plus an additional one-year term for the prior prison term enhancement. The court stayed his sentence for the involuntary manslaughter conviction under section 654.

Ballard appeals, claiming the court abused its discretion by allowing him to be shackled in the jury's presence without first showing a manifest need for the restraint. For reasons we shall explain, we conclude Ballard forfeited this claim and we decline to address its merits on appeal.

FACTUAL BACKGROUND²

A. *The People's Case*

Ballard lived with his girlfriend, Isabel De Leon (Isabel);³ Isabel's 16-year-old brother, Jose De Leon (Jose); and Isabel's three children, Cesar, Estrella, and Angel, who was 16 months old.

In the morning on the day Angel died, Isabel did not notice any bruises on Angel's body when she gave him a bath. Isabel went to work and left her children with Ballard and Jose. Jose testified that Ballard was inside with the three children while Jose was cutting the grass in front of their home. Cesar testified that he woke to sounds indicating someone was being hit, Angel was crying, and Ballard was speaking in an angry tone. From his position outside, Jose observed Ballard leave the home.

² The factual background is substantially abbreviated because the forfeiture of Ballard's sole contention on appeal (discussed, *post*) rendered irrelevant the specific facts underlying his convictions.

³ The use of first names is solely for purposes of clarity.

Ballard took Angel to the hospital and identified himself to staff as the father. Ballard told Dr. Herrera, a pediatric resident, that Angel had fallen off the kitchen table, and Ballard decided to bring him to the hospital. Isabel testified that Ballard called her at work, he sounded desperate, and he wanted to know Angel's birthday and medical history. Ballard again telephoned Isabel and told her to come to the hospital because Angel was there. When Isabel arrived at the hospital she found Angel in the ICU, and Ballard was not in the hospital. Angel was brain dead and later died of blunt force head injuries.

Dr. Christina Stanley, the chief deputy medical examiner for the County of San Diego, performed Angel's autopsy. Dr. Stanley noted that Angel had numerous bruises and abrasions on his head, forehead, ear, cheek, arm, back, abdomen, thigh, knee, and shin. Angel also had a complex skull fracture and a broken humerus bone. Dr. Stanley identified multiple areas of force impact on Angel's head, back, abdomen, knees and lower legs. She believed that the injuries to Angel's face could have been caused by a person forcibly striking Angel with his hand and that the complex skull fracture was inconsistent with a fall. Dr. Sandra Murray, a pediatrician with additional training in family violence, testified that the fracture in Angel's humerus bone and the bruising on both sides of his face were inconsistent with a fall.

B. The Defense Case

Ballard did not present any evidence at trial.

DISCUSSION

Ballard contends the court abused its discretion and committed reversible error by allowing him to be shackled with a ankle restraint in the presence of the jury without first showing a manifest need for the restraint. This contention was forfeited by defense counsel's failure to object at trial.

"It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.)

Here, a conversation between defense counsel and the court regarding the appropriateness of instructing the jury under Judicial Council of California Criminal Jury Instructions (2006-2007), CALCRIM No. 204⁴ provided the only indication on the record that Ballard was shackled by a ankle restraint, which was hidden from the jury's view by a table skirt during the proceeding. There is no evidence in the record that Ballard objected to the use of the ankle restraint, nor does he so assert on appeal.

As any right to challenge the use of the ankle restraint was forfeited by defense counsel's failure at trial to object to the ankle restraint, we need not decide whether the court committed prejudicial error. (See *People v. Ward* (2005) 36 Cal.4th 186, 206.)

We also decline to consider Ballard's claim of ineffective assistance of counsel because it was raised for the first time in his reply brief without any showing of good

⁴ This instruction states, "[t]he fact that physical restraints have been placed on [the] defendant[s] . . . is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations." (CALCRIM No. 204.)

cause. (See *People v. Failla* (2006) 140 Cal.App.4th 1514, 1519, fn. 3.) "When new arguments are raised in the reply brief, to which respondent has no opportunity to respond, we are not required to consider them." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 171.)

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.